

**BEFORE THE STATE OF SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
*EN BANC***

Martha Jones, Employee)	W.C.C. File No: 0403547
)	
Claimant,)	
)	
v.)	
)	
Department of Disabilities)	
and Special Needs, Employer)	
)	
and)	
)	
State Accident Fund, Carrier)	
)	
Defendants.)	
<hr style="width: 30%; margin-left: 0;"/>)	

Jack D. Conway, Employee,)
)
 Claimant,)
)
 v.)
)
 Daryl Jones d/b/a Jones)
 Enterprises, Employer)
)
 and)
)
 Legion Insurance Company)
 in Liquidation through SCPCIGA,)
 Carrier)
)
 Defendants.)
 _____)

W.C.C. File No: 9914871

James Collins, Employee)
)
 Claimant,)
)
 v.)
)
 Milcon Systems, Employer)
)
 and)
)
 St. Paul Fire & Marine Insurance)
 Company, Carrier,)
)
 Defendants.)
 _____)

W.C.C. File No: 0206522

Harold Simmons, Employee)
)
 Claimant,)
)
 v.)
)
 Universal Maritime, Employer,)
)
 and)
)
 Insurance Company of the State)
 of Pennsylvania, Carrier,)
)
 Defendants.)
 _____)

W.C.C. File No: 0315479

Rogelio Garcia, Employee)
)
 Claimant,)
)
 v.)
)
 Mitzila Santos d/b/a M&S)
 Roofing, Employer,)
)
 and)
)
 Liberty Mutual Insurance)
 Corporation, Carrier,)
)
 Defendants.)
 _____)

W.C.C. File No: 0501290

Ed Chamberlain, Employee,)	W.C.C. File No: 0514538
)	
Claimant,)	
)	
v.)	
)	
Frieghtliner Custom Chassis,)	
Employer)	
)	
and)	
)	
American Home Assurance)	
Company, Carrier,)	
)	
Defendants.)	
<hr/>)	

PROCEDURAL ORDER

This matter comes before the South Carolina Workers' Compensation Commission ("Commission") *en banc* on consolidated motions in a number of pending cases relating to the impact of Executive Order 2007-16 ("Executive Order") on legal standards to be applied in adjudicating claims under the South Carolina Workers' Compensation Act. Due to the potentially significant impact of Executive Order 2007-16 on numerous claims pending before the Commission and the need for the Commission to definitively and authoritatively address this issue for the orderly administration of the Workers' Compensation System, the Commission consolidated all pending motions regarding the Executive Order, referred them to the full Commission, and scheduled oral argument for October 25, 2007. Briefs were requested from all litigants in cases with pending motions relating to the Executive Order and *amicus curiae* were invited. Thereafter, on October 24, 2007, Governor Sanford issued a second Executive Order to the Commission, No. 2007-19, and

indicated that it was to supplement and clarify his previous Executive Order, which was to remain in effect. Because the Commission must give ten days notice to all parties regarding any pending motions, the Commission will address only Executive Order 2007-16 at this time. S.C. Reg. 67-215. The Commission may consider any motions regarding Executive Order 2007-19 should they subsequently be filed.

When Workers' Compensation Commissioners adjudicate the rights of litigants under the South Carolina Workers' Compensation Act, they are judicial officers subject to Code of Judicial Conduct. S.C. Code § 42-3-250. The Code of Judicial Conduct imposes significant duties upon Commissioners which are essential to uphold respect and public confidence in the adjudicative work of the Commission. Judicial officers must be independent, impartial and "faithful to the law." S.C. App. Ct. Rule 501, Canons 1, 3. Judicial Officers "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ibid., Canon 2(A). Judicial officers must act "without fear or favor" and "shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment." Ibid., Canon 2(B). Judicial officers "shall not be swayed by partisan interests, public clamor, or fear of criticism." Ibid., Canon 3(B)(2). Further, as judicial officers, Commissioners should not "consider. . .communications made to the judge outside the presence of the parties concerning a pending or impending proceeding. . . ." Ibid., Canon 3(B)(7).

The Commission is in receipt of Executive Order 2007-16, signed by the Honorable Mark Sanford, Governor of South Carolina, on September 20, 2007. The Commission and "each of its individual Commissioners" are directed in Executive Order 2007-16 "in all contested cases to strictly apply" either the Guides to the Evaluation of Permanent Impairment (5th Ed. 2001) (hereafter "AMA

Guides”) or “any other accepted medical treatise or authority in making their injury compensation determinations. . . .” The Commission and individual Commissioners are further directed by the Executive Order “to provide written confirmation to the Office of the Governor” on a quarterly basis that they have adhered to this legal standard.

The directives contained in Executive Order 2007-16, read in a reasonable fashion utilizing the plain and ordinary meaning of the words, require the use of legal standards that are contrary to the statutes adopted by the South Carolina General Assembly and interpreted by the South Carolina Appellate Courts. Executive Order No. 2007-16 requires the strict application of the AMA Guides “or similar medical treatise or authority” in “all contested cases.” Section 42-1-120 defines “disability” as “incapacity because of injury to earn wages the employee was receiving at the time of the injury in the same or any employment.” This statutory definition allows in appropriate cases an examination of the loss of earning capacity as a result of a work related injury in claims arising under Sections 42-9-10 and 42-9-20. These factors, in addition to the use of the AMA Guides, include the claimant’s education, vocational history, vocational training, age, preexisting conditions and other factors relating to a claimant’s alleged loss of earning capacity. E.g., Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664, 666 (2006); Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699, 702 (1996). Requiring disability determinations to be made “strictly” upon the AMA Guides or other medical treatises or authorities, without regard to other potentially probative evidence regarding the loss of earning capacity, would be inconsistent with the clear and settled law of South Carolina.

Executive Order 2007-16 further impacts matters arising under Section 42-9-30. Although the Commission is required to process claims under Section 42-9-30 under the “medical model,”

South Carolina appellate courts have long held that evidence of disability under Section 42-9-30 may come from a variety of sources, including medical experts, lay testimony, and vocational experts. E.g., Linen v. Ruscon Construction Co., 332 S.E.2d 211-212 (S.C. 1985); Lyles v. Quantum Chemical Co., 434 S.E.2d 292, 295 (S.C. App. 1993); Cropf v. The Pantry, Inc., 344 S.E.2d 879, 880-881 (S.C. App. 1986). As the South Carolina Court of Appeals recently stated in Sanders v. Mead Westvaco Corp., 638 S.E.2d 66 (S.C. App. 2006):

We do not agree that a determination of impairment under [Section 42-9-30] mandates only medical evidence be considered by the Commission in determining the degree of disability. . . Further, the Appellate Panel is not bound by the opinion of medical experts and “may find a degree of disability different from that suggested by expert testimony.” Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. Unless the question of the extent of partial loss of use under § 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible.

638 S.E.2d at 70. Limiting determinations under S.C. Code § 42-9-30 to a “strict” application of “AMA Guides or other accepted medical treatises or authority” would be violative of the settled law of South Carolina, as interpreted by the South Carolina Supreme Court and the South Carolina Court of Appeals.

A legal standard similar to that contained in Executive Order 2007-16 was proposed as an amendment to House Bill 4427 by on the floor of the House on April 5, 2006. 2006 House Journal (April 5, 2006), www.scstatehouse.net/scss/116/2005-2006/hjo6/20060405.htm at 33. The Amendment provided that the Commission rely exclusively on the American Medical Association Guides and stated that “other factors including, but not limited to, age, education, and vocational history, may not be considered in determining benefits provided by this schedule.” The Amendment

was debated and a motion to table the amendment was adopted by the full House by a vote of 57-35. The South Carolina Supreme Court has held that a proposal “explicitly rejected by the Legislature” provides evidence of legislative intent. Gilstrap v. Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101, 104 (S.C. 1992). The South Carolina General Assembly’s rejection of the 2006 Amendment is further evidence that the General Assembly did not intend to limit determinations under the Workers’ Compensation Act strictly to an application of the AMA Guides.

The General Assembly has mandated that “all questions arising” under the Workers’ Compensation Act “shall be determined by the Commission. . . .” S.C. Code § 42-3-180. Executive Order 2007-16, which presumes to direct the legal standards to be applied under the Workers’ Compensation Act in pending adjudicative matters before the Commission, creates a real and substantial controversy that has a potential material impact on the legal rights and claims of parties in these matters before the Commission. The matter is squarely before the Commission; the parties have ably briefed the question, and the interests of justice and judicial economy require action on these matters at this time by the Commission.

These motions arise in the course of adjudicative proceedings within the Judicial Department of the Commission. S.C. Code § 42-3-10. The Commission is mindful that the South Carolina Constitution places specific requirements on “judicial or quasi-judicial decision[s] of an administrative agency,” including the provision that the liberty or property rights of a citizen cannot be adjudicated “unless by a mode of procedure prescribed by the General Assembly.” S.C. Constitution Article I, § 22. Through the adoption of the Workers’ Compensation Act, the General Assembly has established an elaborate statutory scheme for adjudicating the rights of workers and employers arising out of allegedly work-related injuries. The Commission is bound by the statutory

laws of the South Carolina, State Constitution, Code of Judicial Conduct and Commissioners' oath of office to uphold and be faithful to these laws.

The Commission has the utmost respect for the Office of the Governor and recognizes the Governor's broad authority to supervise and direct the administrative functions of the Executive Branch. Executive Order 2007-16, however, directs action by Commissioners sitting as judicial officers subject to the Code of Judicial Conduct. S.C. Code § 42-3-250. Commissioners, sitting in their judicial capacity, are mandated by the Code of Judicial Conduct to be "independent," "impartial" and "faithful to the law." Canons 1, 3. The Commission does not have the authority to follow the directives of Executive Order 2007-16 relating to the legal rights of litigants in matters pending under the Workers' Compensation Act that are contrary to the statutes of South Carolina as adopted by the General Assembly or decisions issued by the South Carolina Appellate Courts.¹

The Commission has no interest in injecting itself into any public controversy and takes no position on any public policy issues regarding existing or proposed changes in the Workers' Compensation Act. The Commissioners' duty, sitting as judicial officers, is to address independently and impartially "all questions" that come before them under the Workers' Compensation Act. Because Executive Order 2007-16 sets forth standards contrary to the law of South Carolina, the Commission cannot apply or consider such standards in adjudicating matters pending before the Commission. Canon 3(B)(2) and 3(B)(7).

Public trust and confidence in the independence and impartiality in the work of the Commission are essential to the effective operation of the Workers' Compensation System. It is the

¹The Commission renders no opinion concerning whether Executive Order 2007-16 is in any way unconstitutional since that matter would more appropriately be addressed by the courts.

hope and expectation of the Commission that this Order, signed by all Commissioners, will assure all litigants and the general public that adjudications under the Workers' Compensation System will be conducted with impartiality, independence, and in accord with the rule of law. The Commission will continue to apply the standards set forth in the Workers' Compensation Act and the case law interpreting the same. Having addressed these consolidated motions, these matters are now before the individual Commissioners and Panels from which they arose for disposition on the merits.

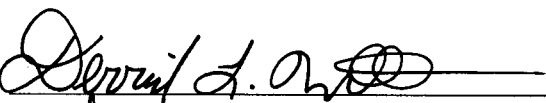
AND IT IS SO ORDERED.

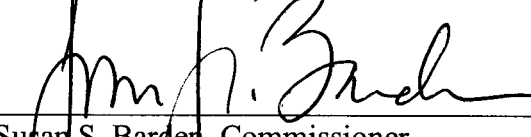
Commissioners of the South Carolina
Workers Compensation Commission

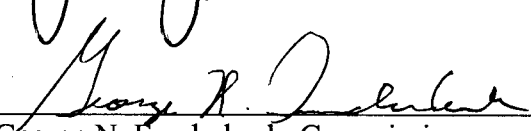


David W. Huffstetler, Chairman

J. Alan Bass, Commissioner

G. Bryan Lyndon, Commissioner

Derrick L. Williams, Commissioner

Susan S. Barden, Commissioner

George N. Funderburk, Commissioner

Andrea P. Roche, Commissioner

October 25, 2007